No. 16-1730

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JESSE SOLOMON,

Plaintiff/Appellee,

v.

BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN, and NFL PLAYER SUPPLEMENTAL DISABILITY PLAN,

Defendants/Appellants.

On Appeal from the United States District Court
For the District of Maryland (No. 1:14-cv-03570)
The Honorable Marvin J. Garbis, District Judge

BRIEF OF APPELLEE

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INTRODUCTION

Jesse Solomon dedicated nine years of his life to the National Football League, as a linebacker for the Minnesota Vikings, the Dallas Cowboys, the Tampa Bay Buccaneers, and the Miami Dolphins. Over the course of his NFL career, he sustained an estimated 69,000 "full-speed contact hits." He suffered dozens of orthopedic injuries, requiring multiple surgeries. His football career ended in 1995 when a particularly severe hit ripped his quadriceps tendon off his kneecap.

The tens of thousands of hits also took a devastating toll on Mr. Solomon's brain. As Dr. Adam DiDio, a neurologist selected by The Bert Bell/Pete Rozelle NFL Player Retirement Plan and The NFL Player Supplemental Disability Plan (collectively, the "NFL Plan," the "Plan," or "Appellants"), explained when evaluating Mr. Solomon in February 2011, Mr. Solomon could not "recall any specific concussions" that he suffered, but regularly "would hit players so hard that it would knock the 'snot' out of him." JA 719. He regularly suffered "'triple vision' after an impact," and reported that "[a]fter an impact everything would go silent and then slowly the volume would increase." *Id.* An MRI of Mr. Solomon's brain as early as 2005 – just ten years after his retirement – "show[ed] multiple white matter changes that [were] most likely a result of multiple high velocity impacts in a helmet-to-helmet fashion and chronic concussion syndrome." JA 460.

Appellants admit that Mr. Solomon is now totally and permanently disabled ("TPD"), *i.e.*, permanently "unable to engage in any occupation or employment for remuneration or profit." Brief of Appellants ("Br.") at 11-12 ("There is no real causation issue in this case."). *See also* JA 127 (Plan § 5.2(a)). Appellants also concede that his disability was caused by the brain injuries he suffered during his nine grueling seasons as an NFL linebacker. Br. 37-38.

When a former NFL player becomes TPD within fifteen years of the end of his NFL career, he is entitled to the Plan's "Football Degenerative" ("FD") retirement benefits. Mr. Solomon applied for benefits on December 17, 2010, and was entitled to FD benefits so long as he was completely disabled as of March 31, 2010, fifteen years after his retirement. The Plan's Disability Initial Claims Committee denied his application for FD benefits, and the Plan's Retirement Board (the "Board"), which makes final benefit determinations on behalf of the Plan, denied his appeal.

Relying on two independent grounds, the District Court held that the Board abused its discretion in denying Mr. Solomon's application for Football Degenerative benefits. **First**, the Board violated section 5.2(b) of the Plan (the "Social Security Provision"), under which "a Player who has been determined by the Social Security Administration to be eligible for disability benefits," absent a finding of fraud (which the Plan has never alleged), will "be deemed to be totally

and permanently disabled." JA 127. The Social Security Administration (the "SSA") determined that Mr. Solomon was eligible for disability benefits as of October 28, 2009 – seventeen months before the March 2010 cut-off. The District Court held that the Board had no discretion to reject the SSA's determination of when Mr. Solomon became disabled, and thus abused its discretion by doing so. JA 84. **Second**, the District Court held that, even if the SSA determination were not binding, the Board abused its discretion because its denial of Mr. Solomon's application, based on one-sided evidence of disability, was neither "the result of a deliberate, principled reasoning process" nor "supported by substantial evidence." JA 87.

On appeal, Appellants impugn the District Court's careful analysis as a "sham." Br. 2. They accuse the District Court of manipulating the record, behavior driven by its "prefer[red]" outcome – or, alternatively, according to Appellants, because the experienced District Judge was thrown off by a "firestorm of misdirection." Br. 2, 3. To the contrary, the District Court's detailed, 27-page opinion reached the only conclusion supportable by the record: that the Board abused its discretion, for multiple, independent reasons. The District Court's judgment should be affirmed.

STATEMENT OF ISSUES

1. Did the District Court correctly conclude that, when the Social Security Administration determines that a Player was disabled during a particular time period, the Plan requires the Board to find that the Player was totally and permanently disabled during that time period?

2. Even if the Plan's Social Security Provision was ambiguous, did the Plan abuse its discretion by rejecting out-of-hand the SSA's determination that Mr. Solomon was entitled to disability benefits beginning October 28, 2008?

3. If the Plan did not make the SSA onset date conclusive, did the District Court correctly conclude that the Board abused its discretion by ignoring evidence presented to it, including arbitrarily disregarding medical reports just after the Football Degenerative cut-off date, even though these reports demonstrated pre-cutoff cognitive impairments linked to disability?

STATEMENT OF THE CASE

A. The NFL Plan

Professional football in the NFL is an extraordinarily dangerous game. The physical and cognitive injuries that players endure are legion. The NFL's own internal estimates, recently uncovered as part of the League's efforts to settle ongoing class-action brain-injury litigation, are that nearly a third of retired players

will develop long-term cognitive problems, and that these symptoms are likely to emerge at notably younger ages than in the general population.[1]

NFL players, through their union, have collectively bargained with NFL team owners for disability benefits, which are administered by the Plan.[2] Players who become totally and permanently disabled by orthopedic or brain injuries that are the regular result of professional football, and are therefore unable to work, are entitled to well-defined benefits. JA 127 (Plan § 5.2(a)). "Football Degenerative" benefits are one of the highest levels of benefits, for former players who become TPD within 15 years of retirement – for Mr. Solomon, by March 31, 2010. JA 125 (Plan § 5.1(c)). (Other, lesser benefits include an "Inactive" classification for players who become TPD more than 15 years after retirement. JA 125 (Plan § 5.1(d)).) There is no dispute that the Plan entitles players to Football Degenerative benefits whenever their *disability* prevents them from working within 15 years of

[1] *See* Report of the Segal Group to Special Master Perry Golkin, *In re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323-AB, (E.D. Pa.), ECF No. 6168 (Sept. 12, 2014) at ¶ 23 (cited in Pl.'s Mem. In Supp. Of Mot. For Summ. J., 14-cv-3570 (D. Md.), ECF No. 23-1 (July 31, 2015) ("Pl.'s S.J. Mem."), at 1).

[2] The Bert Bell/Pete Rozelle NFL Player Retirement Plan (JA 103-76) sets forth the operative language determining eligibility for benefits. The NFL Player Supplemental Disability Plan operates to augment the size of benefits awards after eligibility has been established. JA 23 (¶ 8). *See also Jani v. Bell*, 209 F. App'x 305, 206 n.1 (4th Cir. 2006).

their retirement. Similarly, there is no requirement that a player's physical or cognitive disability be *diagnosed* within 15 years of retirement.

Under the Plan, there are two ways a former player may establish TPD status. **First**, a retired player may establish, through medical or other evidence, that he is "substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit." JA 127 (Plan § 5.2(a)). **Second**, a player is conclusively "deemed" to be totally and permanently disabled when the SSA has "determined" that the person is "eligible for disability benefits under either the Social Security disability insurance program or Supplemental Security Income program." JA 127 (Plan § 5.2(b)). The only exception under § 5.2(b) – the only context in which an SSA disability determination does not automatically entitle a former player to TPD benefits – is if "four voting members of the [six-person] Retirement Board determine that such Player is receiving such benefits *fraudulently* and is not totally and permanently disabled." *Id.* (emphasis added).

When a former player submits a request for disability benefits to the Plan, the claim is first decided by a two-person Disability Initial Claims Committee ("DICC"). A claim is granted only if *both* DICC members agree to approve the claim. JA 140 (Plan § 8.7(b)). If either DICC member votes to deny a claim – if both vote to deny, or if they deadlock – the claim is denied. JA 140 (Plan § 8.6).

DICC determinations, in turn, are reviewed by the Retirement Board (the "Board"), which meets quarterly. Any action by the Board concerning disability benefits requires an affirmative vote by four of the six voting members. JA 140 (Plan § 8.7(a)). Three of those members are appointed by the NFL's team owners, who are also responsible for funding the Plan. JA 30 (Plan § 8.1). *See also* § II.F, *infra* (discussing the resulting conflict of interest). The other three are appointed by the union that represents current NFL players: the NFL Players Association (the "NFLPA"). *Id*. None of the Board's members represents *former* NFL players.[3]

B. Mr. Solomon's Multiple And Varied NFL Injuries

Jesse Solomon graduated from Florida State University with a degree in political science in 1985. He then spent nine seasons, from 1986 to 1995, as an NFL linebacker, for the Vikings, the Cowboys, the Buccaneers, and the Dolphins. JA 582-83. During those nine grueling seasons, he sustained an estimated 69,000 "full-speed contact hits." JA 539. The most serious hits resulted in dozens of orthopedic injuries, requiring multiple surgeries. JA 535-36. His football career

[3] The long-time executive director of the NFLPA, when challenged about routine denials of disability applications by former players, responded, "The bottom line is I don't work for them . . . They don't hire me and they can't fire me. They can complain about me all day long. They can have their opinion. But the active players have the vote. That's who pays my salary." *Bitter Battle For the Old Guard*, Sports Illustrated (Jan. 31, 2008) (*available at* http://www.si.com/nfl/2008/01/31/upshaw0214) (cited in Pl.'s S.J. Mem. at 21-22 & n.22).

ended in 1995 after he suffered an especially gruesome injury that ripped his quadriceps tendon off his kneecap. JA 393, 536.

The tens of thousands of hits Mr. Solomon endured also undisputedly resulted in brain injuries. The evidence of those brain injuries is described below, but Dr. Adam DiDio, a neurologist hired by the Plan to examine Mr. Solomon, summarized those head injuries in February 2011:

> Mr. Solomon cannot recall any specific concussions. He frequently reiterates that he "used to hit them hard, Doc." He recalls being in games on numerous occasions and having "triple vision" after an impact. He says that he would hit players so hard that it would knock the "snot" out of him. He reports that at times he would "lose sense of who you are." After an impact everything would go silent and then slowly the volume would increase. He has never lost consciousness with any of these events but recalls numerous instances of being dazed or experiencing amnesia for the events of the game. He cannot say how often, but too many times to count. . . . He regrets reporting at postseason physical examinations that he was okay. He believes it was a big mistake. He did not want [to] report any injuries so that he could continue to play. . . . He was never formerly told that he had a concussion. He had asked from time to time to sit out for [a] play or two when he was feeling "off" but then would go back in.

JA 719-20.

Mr. Solomon attempted to make a career for himself after leaving the NFL. He returned to college, completed a Master's program at Florida A&M University, received a Florida teaching and coaching certificate, and worked as a high school

football coach and physical education teacher. JA 572-73, 630. But his multiple football injuries, concussions, and surgeries took their toll and, as both the years and the pain advanced, he became progressively unable to work for a living. In 2007, he was forced to resign his coaching and teaching job. JA 572, 616. Mr. Solomon explained that his "constant headaches from helmet to helmet collisions," "severe headaches on a near daily basis," and "dizziness and blurred vision," were the "primary barriers" preventing him from returning to work as a teacher and coach after 2007. JA 616.[4] Mr. Solomon has been unemployed and unable to work since then. JA 572, 616.

C. Mr. Solomon's 2009 Application

Mr. Solomon first applied for TPD benefits on March 11, 2009. JA 571-77. His application was based solely on orthopedic injuries, to his neck, shoulders, elbows, hands, lower back, hips, knees, ankles and feet. JA 574-75, 580, 585.

The Plan hired Dr. George Canizares, an orthopedist, to assess whether those injuries rendered Mr. Solomon TPD. Dr. Canizares confirmed that Mr. Solomon had suffered "significant injuries . . . while he was in the NFL" that had resulted in spinal stenosis, lumbar disk herniations, knee injuries "resulting in degenerative changes," as well as ankle and foot injuries. JA 594. Dr. Canizares concluded that although those orthopedic injuries barred Mr. Solomon from "moderate or heavy

[4] It is simply untrue that "Solomon never claimed that he was unable to work because of neurological conditions." Br. 5.

duty work," as well as "anything that would involve prolonged standing or prolonged walking," a "light sedentary position would be appropriate." JA 594.

Mr. Solomon also submitted additional medical records, including:

(1) **Hudson Letter (February 2006)**. In 2006, Dr. Mark Hudson, who had been Mr. Solomon's physician since 2004, reported a broad array of injuries "that are likely to worsen with time and are seemingly the result of the violent conditions he experienced during his active playing career." JA 461. He also noted that an MRI scan in 2005 (JA 448) "show[ed] multiple white matter changes that are most likely a result of multiple high velocity impacts in a helmet-to-helmet fashion and chronic concussion syndrome." JA 460.

(2) **Matuszak Report (October 2008)**. Brian Matuszak, an occupational therapist, conducted a Functional Abilities Evaluation ("FAE") on October 29, 2008. In his 28-page report (JA 480-507), Mr. Matuszak concluded, among other things, that:

> [I]t is questionable whether Mr. Solomon is able to safely and dependably return to work under even the SEDENTARY category of work . . . . Mr. Solomon is limited by pain, muscle fatigue, poor ROM/endurance and instability in multiple joints. With this level of performance, Mr. Solomon's productivity level for work is poor without significant restrictions and breaks throughout a typical workday. . . . Due to consistently demonstrated performance categorized below

> sedentary level of physical demand, Mr. Solomon does not appear to be appropriate for returning to competitive employment.

JA 482.

(3) **Matsu Report (January 2009)**. Dr. Edward Matsu, an orthopedist, reviewed the Matuszak Report and concluded that Mr. Solomon was "not able to perform even sedentary type[s] of work" and "[t]his makes Mr. Solomon completely disabled from any type of employment." JA 566.

The DICC denied Mr. Solomon's application on May 18, 2009. The sole basis was that Dr. Canizares had "indicated that you are employable." JA 600. The DICC made no reference to any of the other evidence described above.

Mr. Solomon appealed to the Board. JA 616. The Board referred Mr. Solomon for additional examination – but again, only for orthopedic injuries. An orthopedic functional capacity evaluation in September 2009 concluded that he was "capable" of working at a "sedentary work level," although he would "probably be very limited in any type of employment that he would pursue." JA 626, 634. On November 25, 2009, the Board affirmed the denial, concluding Mr. Solomon was not TPD. JA 644-45. Mr. Solomon, who was not represented by a lawyer at the time (*see* JA 616, 647), did not file a lawsuit to challenge the denial.

D. Mr. Solomon's 2010 Application

The Plan recognizes that many players will, for any of various reasons, submit multiple applications over time, whether due to developing new disorders or symptoms from their football injuries, or acquiring new evidence of existing disorders or symptoms. But the Plan also imposes certain limits on successive applications. The Plan strikes a balance with section 5.2(d), the "Serial T&P Applications" provision, which imposes a one-year waiting period after a final denial, before a player may apply again for TPD benefits. JA 127-28. There are two bases on which a successive application can be filed after *fewer* than twelve months: the player (1) "ha[s] become totally and permanently disabled since the date of the original claim due to a new injury or condition," or (2) "informs the Plan of an award of disability benefits under the Social Security disability insurance program or Supplemental Security Income program." JA 128. But even if neither provision is satisfied, once twelve months have passed from a decision on one claim, nothing in the Plan bars a player from submitting a new claim, for any reason.[5]

In light of the "serial applications" rule, Mr. Solomon waited over a year before submitting a new application for TPD benefits. On December 12, 2010, he

[5] Appellants suggest that a player may *never* submit a new claim for the same "impairment[]." Br. 14. But all Appellants cite is the serial application provision, § 5.2(d), which says nothing of the sort. JA 127-28.

filed his second (and only other) application. JA 667-71. Unlike his first application, based solely on orthopedic injuries, his second application focused on Mr. Solomon's brain injuries, identifying "multiple traumatic brain injuries," "cognitive impairment," "degenerative depression" and "anxiety" as the reasons for his total and permanent disability. *See* JA 669.[6]

As noted above, the Board already had evidence of Mr. Solomon's brain injuries: the 2005 MRI report, which Dr. Hudson had explained "show[ed] multiple white matter changes that are most likely a result of multiple high velocity impacts in a helmet-to-helmet fashion and chronic concussion syndrome." JA 460. Mr. Solomon also submitted the following additional evidence of brain injury and resulting disability:

(1) **Fernandez Report #1 (June 2010)**. On June 11, 2010, Mr. Solomon was examined by a psychiatrist, Dr. Jamie Fernandez. She conducted what the Plan's neurologist later described (JA 718) as an "extensive" neuropsychiatric evaluation and neuropsychological testing, comprised of almost a dozen separate protocols.

[6] Because his second application – unlike his first application – was based on a non-orthopedic injury, Mr. Solomon did not actually need to wait a year before filing his second application. He could have asked the Board to "waive" the one-year waiting period because he was seeking benefits for "a new injury or condition." JA 128 (Plan § 5.2(d). But, in any event, Mr. Solomon waited a full year.

Dr. Fernandez's report (JA 866-881) observed that Mr. Solomon had "depressive symptoms and [a] passive death wish," and noted his complaints of "behavioral disinhibition, resulting in him leaving his job as a football coach." JA 866. He was "[f]ormerly a high school football coach but because [his] thoughts/behavior were escalating[,] he left," in 2007, three years earlier. JA 869. She observed "the role of [traumatic brain injury]-related memory loss and disinhibition," and concluded that Mr. Solomon was "suffering from depressive . . . and behavioral symptoms, [as well as] cognitive dysfunction as the result of" traumatic brain injury and obstructive sleep apnea. JA 869, 881.[7]

(2) **Dr. Stallworth's MRI Report (June 2010).** Mr. Solomon also had an MRI of his brain performed by Dr. Dexter Stallworth on June 11, 2010. This scan confirmed the existence of "multifocal . . . lesions along the right and left frontal and parietal lobes of the brain." JA 883. Dr. Stallworth concluded that "[t]hese areas are consistent with microdisruption of white matter tracts within the brain *and are thought to be post-traumatic [in nature]*". *Id.* (emphasis added). This finding

[7] Appellants do not dispute that Mr. Solomon's total and permanent disability resulted from the traumatic brain injuries he suffered in the NFL. Br. 11-12, 37-38. Thus, they concede that it is immaterial that Mr. Solomon has suffered from sleep apnea.

confirmed the results of Mr. Solomon's 2005 MRI, *see* JA 448, which had noted similar brain injuries caused by football. JA 448, 460

(3) **Fernandez Report #2 (August 2010)**. On August 23, 2010, Dr. Fernandez again evaluated Mr. Solomon. She observed Mr. Solomon's "history of TBI in the context of pro football" and noted his "decreased attention, poor concentration, slurred speech, decreased recall and increased irritability," along with depression and anxiety, all of which had worsened in recent years. JA 884. She concluded that Mr. Solomon "is currently disabled from numerous physical injuries and chronic pain *in addition to* the neuropsychiatric sequelae from which he suffers." *Id.* (emphasis added).

(4) **Fernandez Report #3 (April 6, 2011)**. Dr. Fernandez prepared one final assessment of Mr. Solomon. She noted his 2010 brain MRI, which revealed "microscopic damage throughout many areas of the brain," which was the likely result of "external forces," *i.e.*, the nearly 70,000 high-speed collisions Mr. Solomon encountered during his NFL career. JA 767. "Prominent manifestations of this type of brain injury include impaired cognitive function, resulting in disorganization, impaired memory, and varying degrees of inattentiveness." *Id.*

> Dr. Fernandez reviewed the eleven different tests she had performed on Mr. Solomon almost a year before, and concluded that his "symptomatology is consistent with severe postconcussive syndrome, and possible chronic traumatic encephalopathy (CTE), a degenerative brain disease caused by head trauma." JA 767. She explained that symptoms associated with CTE include "memory impairment, emotional instability, erratic behavior, depression, and problems with impulse control, all of which are contributing to Mr. Solomon's current inability to sustain employment and function socially." JA 767-78. Thus she concluded that Mr. Solomon was "currently disabled as the result of multiple traumatic brain injuries sustained in the context of playing professional football, extensive orthopedic injuries, cognitive impairment, and severe symptoms of depression and anxiety." JA 767.

Meanwhile, the Plan had referred Mr. Solomon to be examined by neurologist **Dr. Adam DiDio**, who examined Mr. Solomon on February 17, 2011. Dr. DiDio documented Mr. Solomon's complaints of cognitive impairment, anxiety, depression, and severe recurring headaches, JA 716, as well as "severe problems" with his memory, "poor concentration and focus," becoming "easily distracted," being "easily angered" and "prone to outbursts, "severe headaches on a near daily basis," and "dizziness and blurred vision." JA 718-19. Dr. DiDio noted

that Mr. Solomon had "presented with progressive worsening in cognition over a period of 5-10 years" (*i.e.*, within 15 years of retirement), including "decreased attention, poor concentration, slurred speech and increased irritability," along with "severe depression and anxiety." JA 718.[8] As a result, Mr. Solomon – despite his substantial education, training and experience as a coach and educator – reported being let go from several jobs for "losing his cool." JA 719.

Dr. DiDio credited and agreed with each of Dr. Fernandez's earlier evaluations, which dated back to June 2010. JA 718, 722. He found that Mr. Solomon suffered from "severe cognitive impairment, depression, anxiety, and near-daily migraine headaches" caused by "innumerable" on-the-field collisions and "many Grade 1 and Grade 2 cerebral concussions" resulting in "severe post-concussion/post-traumatic syndrome." JA 722. Dr. DiDio went on to "agree" with Dr. Fernandez that Mr. Solomon "probably is demonstrating features of chronic traumatic encephalopathy (CTE)." JA 722. Thus Dr. DiDio – the Plan's own doctor – found that Mr. Solomon was totally and permanently disabled. JA 717.

E. The DICC's Denial of Mr. Solomon's December 2010 Application

In March 2011, the DICC met to consider Mr. Solomon's application. JA 755. As discussed below, the Plan ultimately received reports from two different

[8] At least as of mid-1999, the Plan's "Physician's Report" asked examining physicians to note "when [the] present disability occur[red]." JA 99. The Plan has since removed that question from the form. *See* JA 587-99 (new Physician's Report form).

physicians (including one chosen by the Plan) who agreed Mr. Solomon was totally and permanently disabled as a result of repeated concussions. JA 716-23 (DiDio Report); JA 866-881 (Fernandez Report #1); JA 884-85 (Fernandez Report #2); JA 767-68 (Fernandez Report #3).[9] All of the reports were new: they had not been considered by the Plan when it denied Mr. Solomon's January 2009 application. These reports also were *undisputed*. Not a single mental health professional who was asked to opine on whether Mr. Solomon's brain injuries rendered him TPD disagreed with Dr. Fernandez's and Dr. DiDio's unanimous assessment.

On March 9, 2011, however, the DICC ruled that Mr. Solomon was not disabled, and denied his application. The Plan's denial letter stated that one member of the DICC had approved his request, relying on Dr. DiDio's report, but that the other DICC member had found "insufficient evidence to support a finding of total and permanent disability." JA 758. This deadlock resulted in denial of Mr. Solomon's application. The Plan did not explain how the evidence was weighed or assessed, or why Dr. DiDio's undisputed findings were insufficient.

Mr. Solomon appealed to the Retirement Board on April 27, 2011. JA 775.

[9] Dr. Fernandez issued her April 6, 2011 assessment (JA 767-68) after Mr. Solomon had submitted his December 2010 application, but before the Retirement Board considered his appeal. *See* JA 777 (noting on April 28, 2011 that the Board had "received [his] appeal of the [DICC's] denial"). The Board received Dr. Fernandez's report, at the latest, by August 4, 2011. See JA 767 (date stamp: "RBM AUG 04 2011"). It denied his appeal on November 23, 2011. JA 822.

F. The Social Security Administration's Determination of Mr. Solomon's Total Disability As Of October 2008

Meanwhile, Mr. Solomon had applied for Social Security disability benefits. JA 783. While his December 2010 application was pending with the DICC, an SSA Administrative Law Judge, after considering the medical evidence and following a June 16, 2011 hearing, made a "fully favorable decision" and found that he had been completely disabled since at least October 29, 2008 – impaired so severely that he could not "perform any work existing in significant numbers in the national economy." JA 783. This October 29, 2008 disability date corresponds to the date of Mr. Solomon's Functional Capacity Evaluation by Brian Matuszak, who had concluded that Mr. Solomon was "not able to perform even SEDENTARY level of work." JA 537 (emphasis in original). Thus, the SSA found that Mr. Solomon became completely disabled within thirteen years of his NFL retirement – well within the 15-year period for Football Degenerative benefits. *Id.*

Mr. Solomon promptly advised the Retirement Board of the SSA's disability determination. JA 786. The Board had not yet decided Mr. Solomon's appeal when it received this notice of SSA action.

G. The Board's Rejection of TPD Benefits, and Subsequent Appeals

The record before the Retirement Board was clear-cut. As discussed above, there was no dispute that Mr. Solomon was completely disabled as a result of

multiple traumatic brain injuries, or concussions. Yet on August 10, 2011, the Board denied Mr. Solomon's request for full TPD disability benefits, and granted Mr. Solomon only the more limited "Inactive" TPD benefits. JA 805.[10] The decision was inexplicable, and the Board did not disclose why it rejected both the consensus medical reports and the supposedly dispositive SSA determination. Instead, the Board blandly recited that "the record did not support a finding of total and permanent disability prior to March 31, 2010." JA 808.

The Plan permits an applicant to request further review by the Board, which Mr. Solomon did, on September 27, 2011. JA 810. He pointed out that the SSA had already determined he was disabled as of October 2008 – long before the 15-year Football Degenerative limit – and asked the Retirement Board to "Please consider [the] matter carefully!" *Id*. On November 23, 2011, the Board nonetheless denied Mr. Solomon's appeal. JA 822. As with its original denial, the Board neither discussed specific medical records, nor explained how it reconciled its denial with the clear medical evidence that Mr. Solomon was totally and permanently disabled within 15 years of his NFL retirement.

[10] "Inactive" TPD benefits are the third (and lowest) of the three benefit levels relevant to this case. "Football Degenerative" TPD benefits which Mr. Solomon seeks are the second (and middle) level of benefits. The Plan awarded Mr. Solomon $2,500.50 per month in "Inactive" TPD benefits. JA 805. "Football Degenerative" benefits are "no less than $4,000" per month (JA 806), and in fact are considerably more.

Instead, the Board provided two bases for concluding that Mr. Solomon was not entitled to Football Degenerative benefits.

First, the Board stated, "[Y]ou previously applied for total permanent disability benefits in 2009, and . . . your claim was denied as was your appeal. . . . [T]he disposition of that earlier claim is incompatible with finding that you were totally and permanently disabled prior to March 31, 2010." JA 823. As explained above, however, the Plan expressly permits successive applications so long as the applicant complies with the one-year waiting period, and, in any event, there was nothing "incompatible" with Mr. Solomon being totally and permanently disabled in March 2010 but *not* being totally and permanently disabled in March 2009.

Second, having concluded that the SSA decision on the *timing* of Mr. Solomon's disability status was "not binding on the Plan," the Board concluded that "the facts and circumstances" did not support a finding that Mr. Solomon was TPD as of March 31, 2010. The basis for that conclusion was this: "[T]he medical records you submitted with your current appeal were submitted together with your prior claim and appeal, both of which were denied." JA 823. As discussed below, the SSA's decision that Mr. Solomon was "disabled as of October 29, 2008" (JA 783) *was* binding on the Plan. *See* § I, *infra*. But even if it was not binding, the Board's denial was plainly incorrect, because Mr. Solomon presented five new

reports that had not existed at the time of his 2009 application: the three Fernandez reports, the Stallworth MRI report, and the DiDio report. *See* pp. 13-17, *supra*.

H. District Court Proceedings

Because the Plan is subject to ERISA, Mr. Solomon challenged the Board's final decision in the District Court as an abuse of discretion pursuant to ERISA. JA 7-19 (complaint).[11] The parties cross-moved for summary judgment. JA 32-33 (Plaintiff's motion); JA 65-66 (Defendants'). The District Court granted summary judgment to Mr. Solomon, concluding that the undisputed evidence established that the Board had abused its discretion, for two independent reasons.

First, the Board violated the Social Security Provision, because it failed to "deem" Mr. Solomon TPD during the period in which the SSA had already determined Mr. Solomon to be eligible for disability benefits. JA 84.

Second, the District Court held that, even if the SSA disability finding was not conclusive, the Board abused its discretion because its denial of Mr. Solomon's application was neither "the result of a deliberate, principled reasoning process" nor "supported by substantial evidence." JA 87. The Board failed to address

[11] In passing, Appellants argue that this case was untimely under the contractual limitations period set forth in section 11.7(a) of the Plan. Br. 32-33. Not only was Mr. Solomon's 2010 application new in multiple critical respects, *see* pp. 13-17, *supra*, but the Plan undisputedly permits players to re-apply for benefits even if they have been previously denied, *see* p. 12, *supra*, and in any event the limitations clock under section 11.7(a) starts at the time of an "adverse benefit determination" – here, November 23, 2011. JA 823.

substantial evidence of TPD arising long *before* the March 31, 2010 cut-off, including a December 2005 MRI showing "white matter changes in the deep white matter of both parietal lobes," JA 87 (citing JA 448); a February 2006 physician report attributing the "white matter changes" as well as "chronic headaches" Mr. Solomon suffered to his "multiple high velocity impacts . . . and chronic concussion syndrome," *id.* (citing JA 460); and Mr. Solomon's own report, following his forced resignation as a high school football coach in 2007, that his inability to continue to work "stemm[ed] from his cognitive impairments," *id.* (citing JA 869). The Board also ignored substantial evidence that *post*-dated March 31, 2010, but was further evidence that Mr. Solomon's cognitive impairments had rendered him totally and permanently disabled *before* March 31, 2010 – the "most significant," according to the District Court, being "unrefuted evidence" from June 2010 diagnosing Mr. Solomon with a brain injury known as diffuse axonal injury. JA 88 (citing JA 883).

On June 22, 2016, the Plan filed a notice of appeal. JA 96.

STANDARD OF REVIEW

To determine the appropriate standard of review for a challenge to an ERISA benefits decision, this Court, like the District Court, employs a three-step approach. *Feder v. Paul Revere Life Ins. Co.*, 228 F.3d 518, 522 (4th Cir. 2000). First, the court decides *de novo* whether the plan's language confers discretion to

determine eligibility for benefits or construe plan terms. *Id*. Second, if the plan confers discretion, the court decides *de novo* whether the acts were within the scope of the discretion conferred by the plan. *Id*. Third, if the actions were within the scope of the discretion, the court reviews the decision for an abuse of discretion. *Id*.

The Board is an "ERISA fiduciary," which means it exercises "discretionary authority or discretionary responsibility in the administration of [the Plan]." 29 U.S.C. § 1002(21)(A)(iii). Although the Plan grants the Board broad discretion, JA 141 (Plan § 8.9), that does not mean the Board has *unlimited* discretion to deny claims. A court may only uphold an ERISA fiduciary's decision if it is "reasonable"; any other decision constitutes an abuse of discretion. *Booth v. Wal-Mart Stores, Inc.*, 201 F.3d 335, 344 (4th Cir. 2000). "[T]he abuse of discretion standard is less deferential to administrators than an arbitrary and capricious standard would be; to be unreasonable is not so extreme as to be irrational." *Evans v. Eaton Corp. Long-Term Disability Plan*, 514 F.3d 315, 322 (4th Cir. 2008).

There are two overarching requirements for an ERISA benefits decision to be "reasonable." **First**, the decision must be the result of a "deliberate, principled reasoning process," a process that must be both "fair" and "searching." *Evans*, 514 F.3d at 322-23. **Second**, the decision must be supported by "substantial evidence," meaning "evidence which a reasoning mind would accept as sufficient to support a

particular conclusion." *DuPerry v. Life Ins. Co. of N. Am.*, 632 F.3d 860, 869 (4th Cir. 2011) (quoting *LeFebre v. Westinghouse Elec. Corp.*, 747 F.2d 197, 208 (4th Cir. 1984)). Those two hurdles are both mandatory; if an ERISA fiduciary (a) did not engage in a "deliberate, principled reasoning process" ***or*** (b) did not have "substantial evidence" for its decision, the decision constitutes an abuse of discretion. To assist courts in determining whether those requirements have been met, this Court has enumerated eight factors relevant to whether an ERISA fiduciary has abused its discretion:

> (1) the language of the plan; (2) the purposes and goals of the plan; (3) the adequacy of the materials considered to make the decision and the degree to which they support it; (4) whether the fiduciary's interpretation was consistent with other provisions in the plan and with earlier interpretations of the plan; (5) whether the decision-making process was reasoned and principled; (6) whether the decision was consistent with the procedural and substantive requirements of ERISA; (7) any external standard relevant to the exercise of discretion; and (8) the fiduciary's motives and any conflict of interest it may have.

Booth, 201 F.3d at 342-43.

As for the evidence a court may consider in assessing an ERISA fiduciary's denial of benefits, the primary basis for judicial review is the administrative record compiled by the Plan. But a court may also consider evidence outside the administrative record "when such evidence is necessary to adequately assess the *Booth* factors and the evidence was known to the plan administrator when it

rendered its benefits determination." *Helton v. AT&T, Inc.*, 709 F.3d 343, 356 (4th Cir. 2013). Evidence about earlier interpretations of the Plan, the adequacy of the record, and possible conflicts of interest are among the *Booth* factors that often require extrinsic evidence. *Id.* at 354.

SUMMARY OF ARGUMENT

Appellants concede that the evidence before the District Court was undisputed; they seek no remand for further proceedings. The experienced District Judge concluded that the Board ***neither*** engaged in a deliberate, principled reasoning process, ***nor*** had substantial evidence for its denial of Mr. Solomon's 2010 application. That decision was eminently correct – and the only one supportable on the undisputed record – for three reasons.

First, the language of section 5.2(b) is clear. When the SSA made its "fully favorable" decision in June 2011, it "determined" – in the language of 5.2(b) – that Mr. Solomon was eligible for Social Security disability benefits not only as of the dates of his applications (July 13, 2009, and December 20, 2010), but back to October 28, 2008. According to section 5.2(b), when the SSA has "determined" a Player to be "eligible for disability benefits," the person "will be deemed to be totally and personally disabled." Instead of following this language, the Board rejected the SSA's determination, and concluded instead that Mr. Solomon had become TPD at some (unspecified) time after March 31, 2010. A plan

administrator's rejection of plain language in a plan "constitutes an abuse of discretion," *Blackshear v. Reliance Std. Life Ins. Co.*, 509 F.3d 634, 639 (4th Cir. 2007).

Second, even if the Court were to conclude that section 5.2(b) was ambiguous, the Board's rejection of the SSA's onset date determination was an abuse of discretion under the eight-factor *Booth* test. The language of section 5.2(b), even if ambiguous, strongly supports the District Court's conclusion that SSA onset date determinations are binding. The Board's explanation for its Social Security Provision-based denial was not only woefully incomplete, reflecting no reasoning whatsoever, but would lead to absurd results. Moreover, the circumstances surrounding the Plan's adoption of section 5.2(b), and its subsequent amendment of the Plan, among other factors, further confirm that the Plan was designed to treat SSA onset date determinations as binding.

Third, even if the SSA's onset date determination was not binding on the Plan, the District Court correctly concluded that the Board abused its discretion. The Board ruled that Mr. Solomon did not become totally and permanently disabled until sometime after March 31, 2010. But to reach that conclusion, it completely ignored critical evidence, and failed to reconcile its decision with undisputed evidence that Mr. Solomon's cognitive impairments had completely disabled him only three months after the cut-off. Every single neurological

examination of whether Mr. Solomon was TPD as a result of traumatic brain injury concluded that he was. To be sure, there was a small amount of conflicting evidence as to whether Mr. Solomon's many *orthopedic* injuries rendered him totally and permanently disabled. But the medical professionals that examined Mr. Solomon's cognitive and psychological condition – including a neurologist chosen by the Plan – *unanimously* concluded that his brain injuries rendered him totally and permanently disabled. For these additional, independent reasons, the Board abused its discretion.

ARGUMENT

I. The Plan's Social Security Provision Unambiguously Required Deference To The SSA's Onset Date Decision.

Until 2014, section 5.2(b) of the Plan provided that "a Player who has been determined by the Social Security Administration to be eligible for disability benefits" will, absent a finding of fraud, "be deemed to be totally and permanently disabled." JA 127. Accordingly, the District Court held that, under section 5.2(b), "the Plan was bound by the fact, and onset date, of disability found by the SSA when it made its disability award to Solomon." JA 84. Appellants argue that they should be permitted to slice and dice an SSA ruling, and reject the SSA's determination of *how long*, leading up to the SSA's decision date, a beneficiary has been eligible for disability benefits. But that is not a reasonable construction of 5.2(b). Nor does any other provision in the Plan make that provision ambiguous.

Because the Board's decision was contrary to the plain terms of the Plan, and because a plan administrator's disregard of plain language in a plan "constitutes an abuse of discretion," *Blackshear*, 509 F.3d at 639, its denial of Mr. Solomon's FD benefits application was an abuse of discretion.

A. Defendants Violated The Plain Language Of Section 5.2(b).

Section 5.2(b) then provided, in full, as follows:

> Effective April 1, 2007, ***a Player who has been determined*** by the Social Security Administration ***to be eligible for disability benefits*** under either the Social Security disability insurance program or Supplemental Security Income program, and who is still receiving such benefits at the time he applies, ***will be deemed to be totally and permanently disabled***, unless four voting members of the Retirement Board determine that such Player is receiving such benefits fraudulently and is not totally and permanently disabled.

JA 127 (emphases added). In June 2011, the SSA determined that, beginning October 29, 2008, Mr. Solomon had been eligible for disability benefits. JA 783. The SSA thus determined not only that Mr. Solomon was disabled as of the date of its decision (June 2011), and the date of his applications (July 2009 and December 2010), but that he had been disabled since October 29, 2008. *Id.*

The Board conceded that, in light of the SSA's determination, it was bound to find that Mr. Solomon was totally and permanently disabled. JA 807. But Appellants argue that section 5.2(b) permitted the Board to *reject* the SSA's determination of how long Mr. Solomon had been disabled.

The plain language of section 5.2(b), however, did not allow the Board to accept only part of an SSA disability determination. The effect of section 5.2(b)'s plain language becomes clearest when one focuses on the 32-month period between when the SSA happened to issue its decision (June 21, 2011), and when it concluded Mr. Solomon had first become eligible for benefits (October 29, 2008). The SSA "determined" – in the language of 5.2(b) – that Mr. Solomon was "eligible for disability benefits" during that period. According to section 5.2(b), when the SSA has "determined" a Player to be "eligible for disability benefits," the person "will be deemed to be totally and personally disabled."

Appellants' brief focuses on the eight-factor abuse of discretion test. Br. 26-27. But that test applies only if the language of the plan is not "clear." *Lockhart*, 5 F.3d at 78. "[E]ven when a plan confers discretion on the plan administrator to construe the meaning of the plan's terms, the plan administrator is 'not free to alter the terms of the plan or to construe unambiguous terms other than as written.'" *Adams v. Louisiana-Pac. Corp.*, 177 F. App'x 335, 343 (4th Cir. 2006) (quoting *Colucci v. Agfa Corp. Severance Pay Plan*, 431 F.3d 170, 176 (4th Cir. 2005). "To the extent the administrator enjoys discretion to interpret the terms of a plan in the course of making a benefits-eligibility determination, such interpretive discretion applies *only to ambiguities* in the plan." *Blackshear*, 509 F.3d at 639 (emphasis in original).

"If the denial of benefits is contrary to the clear language of the plan, the decision will constitute an abuse of discretion." *Lockhart v. United Mine Workers of Am. 1974 Pension Trust*, 5 F.3d 74, 78 (4th Cir. 1993) (citations and alterations omitted). For the reasons stated above, the Plan language here *was* clear. Yet despite the mandatory language in section 5.2(b) ("will be deemed"), and despite the SSA's determination that Mr. Solomon *was* "disabled" during the relevant period, the Board did *not* "deem[]" Mr. Solomon totally and personally disabled during that period. Instead, the Board concluded that Mr. Solomon "became" disabled at some (unspecified) time after March 31, 2010. JA 823. As discussed below, the "deemed disabled" provision in section 5.2(b) was adopted in June 2007 amid intense pressure on the NFL. Appellants may regret having adopted those terms in the Plan. And, indeed, the Plan was later amended, to state that SSA determinations were *not* fully binding. *See* § II.C, *infra*. But the language in effect at the time of Mr. Solomon's application was plain, and by ignoring that language, the Board abused its discretion. For this reason alone, the Court should affirm the judgment of the District Court.

B. Section 5.5(a) Does Not Render the SSA Deference Provision Ambiguous.

Appellants next argue that even if section 5.2(b) unambiguously renders SSA onset date determinations binding, a different provision (§ 5.5(a)) creates ambiguity, and the Board had discretion to construe the two sections together to

permit the Board to reject the SSA's decisions. Br. 25-26. Section 5.5(a) provides that "[c]lassification of total and permanent disability benefits under Section 5.1 will be determined by the Retirement Board or the [DICC] in all cases on the facts and circumstances in the administrative record." JA 129. Appellants' claim is that when sections 5.2(b) and 5.5(a) are read together, they allow the Board to ignore the SSA's finding about when Mr. Solomon became totally and permanently disabled, even if the Board was bound by the SSA's finding that Mr. Solomon *was* totally and permanently disabled. This contrived attempt to manufacture ambiguity fails for five reasons.

First, there is no evidence, and Appellants do not suggest, that the Board actually relied on 5.5(a) in rejecting Mr. Solomon's application. A plan administrator, when its decision is subject to an abuse-of-discretion challenge, may not later invoke new bases to affirm a benefits denial upon which the administrator did not rely. *See Jani*, 209 F. App'x at 318 n.10 ("[T]he Board's discretion to interpret and define Plan terms does not allow the Plan to contrive *ex post* interpretations on appeal.").

Second, section 5.2(b) means what it says, and is unambiguous. Although an ERISA plan, like any other contract, must be read as a whole, *Johnson v. American United Life Ins. Co.*, 716 F.3d 813, 820 (4th Cir. 2013), "the plain

language of an ERISA plan must be enforced in accordance with 'its literal and natural meaning.'" *United McGill Corp. v. Stinnett*, 154 F.3d 168 (4th Cir. 1998).

Third, section 5.5 could only conceivably render section 5.2 ambiguous if there were an inherent conflict or contradiction between the two sections. *Guerra-Delgado v. Popular, Inc.*, 774 F.3d 776, 783 (1st Cir. 2014). But none exists. Section 5.2 makes SSA determinations binding – period – as discussed above. All section 5.5 says is that classification determinations "will be determined . . . in all cases on the facts and circumstances in the administrative record." JA 129. An SSA disability ruling is a "fact[] and circumstance[]in the administrative record," which has conclusive ("deemed") effect, and Appellants do not claim otherwise. Requiring the Board to comply with section 5.2, including as to onset dates, is entirely consistent with section 5.5.

Fourth, the issue presented by Mr. Solomon's application was narrow: what effect should the SSA's disability determination have on his entitlement to benefits under the Plan? There is a provision that specifically addresses that question: section 5.2(b). In contract interpretation, as in statutory interpretation, "the common (and commonsensical) rule [is] that a specific provision . . . governs the circumstance to which it is directed, even in the face of a more general provision." *Capital Ventures Intern. v. Republic of Argentina*, 652 F.3d 266, 271 (2d Cir. 2011). *See Burgin v. Office of Pers. Mgmt.*, 120 F.3d 494, 498 (4th Cir.

1997) ("[I]n harmonizing the Plan's provisions, it is generally accepted that we give greater weight to specific and exact language than to more general language") (citing Restatement (Second) of Contracts § 203(c) (1981)); *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957) ("Specific terms prevail over the general in the same or another statute which otherwise might be controlling."). Appellants' reliance on the far more general "facts and circumstances" provision flips that rule on its head.

Fifth, it is Appellants' proffered interpretation, not Mr. Solomon's, that would render Plan language "superfluous." *Cf.* Br. 27. As discussed below, the purpose of section 5.2(b) was to compel the Board to accept SSA determinations. *See* § II.C, *infra*. If the Board's interpretation of section 5.5(a) were given effect, it would render section 5.2(b) meaningless, because the Board could reject or overrule the SSA in any case by simply invoking the "facts and circumstances" talisman in 5.5(a). *See Johnson v. Am. United Life Ins. Co.*, 716 F.3d 813, 820 (4th Cir. 2013) ("[C]ourts should seek to give effect to every provision in an ERISA plan, avoiding any interpretation that renders a particular provision superfluous or meaningless."). Indeed, by Appellants' reasoning, section 5.5(a) would permit the Board to reject an SSA determination *entirely*, and conclude based on the "facts and circumstances" that a person whom the SSA determined to be disabled was not TPD *at all*. Yet even Appellants do not contend that they have that authority.

* * *

In sum, the language of section 5.2(b) is plain, and by disregarding the SSA's determination that Mr. Solomon was entitled to disability benefits beginning October 28, 2009, the Board abused its discretion.

II. The Board's Disregard of The SSA's Onset Date Determination Was Also An Abuse Of Discretion Under The *Booth v. Walmart* Factors.

For the reasons stated above, section 5.2(b) was unambiguous. But even if the Court were to conclude that section 5.2(b) was ambiguous, and thus the language of that section was not dispositive – and were instead to apply the eight-factor *Booth* test – the Board's rejection of the SSA's onset date determination was an abuse of discretion.[12]

A. The Language Of The Plan Favored Mr. Solomon's Interpretation

Plan language is the most important factor in determining whether a plan administrator has abused its discretion. *DuPerry*, 632 F.3d at 870 ("Of course, we begin with the language of the [plan]."). Even if this Court were to conclude that

[12] Scattered throughout Appellants' brief is the suggestion, without citation to authority, that there should be a lower standard of review because the Board's decision was unanimous. *E.g.*, Br. 3, 31. But unanimity among a fiduciary's constituents is not among even the eight broad factors enumerated in *Booth*. Moreover, this Court has previously found that *this* plan administrator (the Retirement Board) abused its discretion, even when its decisions were unanimous. *See Jani*, 209 F. App'x at 317; *Jani v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 04-cv-1606-WDQ, ECF No. 34 (Dec. 20, 2004) at 2 (noting that the Board's denial of Mike Webster's appeal was unanimous).

the Board's violation of plan terms was not sufficient *alone* to render the decision an abuse of discretion, this factor heavily weighs in favor of affirming the District Court's judgment, for the reasons stated above. *See* § I.A, *supra*.

Appellants argue that this Court should weigh this factor differently than the District Court did, because the Board had discretion to construe the Plan, and *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 110 (2008), "'forecloses' application of the *contra proferentum* [sic] rule" here. Br. 29 (quoting *Carden v. Aetna Life Ins. Co.*, 559 F.3d 26, 260 (4th Cir. 2008)). But *Carden* simply does not stand for the broad proposition for which Appellants cite it. The question in *Carden* was whether, when a plan administrator labors under a conflict of interest, *that conflict* should be accounted for by construing ambiguities against the administrator. 559 F.3d at 260. *Glenn* may very well foreclose the use of a *contra proferentem* rule as a "special burden-of-proof rule[]" to tilt the scale to account for an "evaluator/payor conflict." *Id.* (quoting *Glenn*, 554 U.S. at 116). It does not, however, foreclose the common-sense notion that, in deciding whether a plan administrator's interpretation of a plan is "reasonable," it is relevant who drafted particular language, and the circumstances surrounding that process.

In any event, this Court need not resolve whether, and to what extent, the fact that the Plan was drafted by Appellants should be construed against them. The plan language itself establishes that the Board's interpretation was unreasonable, a

conclusion buttressed by the other relevant factors, discussed below. After all, the District Court mentioned the *contra proferentem* concept in a single sentence, in passing, in the context of explicating a different point – that the subsequent amendment of the Plan in 2014 was further evidence that the Board's interpretation of the prior version was unreasonable. JA 78.

B. The Decision-Making Process Was Neither Reasoned Nor Principled.

The District Court concluded, after a careful review of the record, that the Board's decision "was not 'the result of a deliberate, principled reasoning process.'" JA 87 (quoting *Bernstein v. CapitalCare, Inc.*, 70 F.3d 783, 788 (4th Cir. 1995)). As with the Board's rejection of the SSA onset date determination, the District Court's conclusion was clearly correct, for three reasons.

1. No explanation. Faced with the SSA's express findings about the date of Mr. Solomon's disability – findings that are "deemed" correct under the Plan Document, § 5.2(b) – the Retirement Board had only this to say: "such effective date decisions are not binding on the Plan." JA 823. This statement reflects no reasoning whatsoever, let alone suggests that the Board's denial was the result of a "deliberate, principled reasoning process." *See Bernstein*, 70 F.3d at 788; *Helton*, 709 F.3d at 359.[13]

[13] Appellants seem to suggest that the Board was entitled to discount the SSA's determination because Mr. Solomon did not "provide his SSA file." Br. 6. But

2. Absurd results. Far from being "reasoned and principled," the Board's strained construction of the SSA determination provision would create absurd results. Mr. Solomon applied for Social Security disability benefits on July 13, 2009, and December 20, 2010. JA 783. His application was premised on his contention that he was eligible for disability benefits as of those dates. Whenever the SSA makes a finding of disability, it must also determine when the disability began, because a condition of benefit eligibility is having been disabled for at least five consecutive months. 20 C.F.R. § 404.315. When the SSA finally processed and decided Mr. Solomon's application, the agency made a "fully favorable" decision, agreeing with Mr. Solomon that he had been disabled *at least* by the time of his applications. JA 783. Having concluded that Mr. Solomon was entitled to disability benefits, the SSA determined that Mr. Solomon's disabled status began at least as early as October 29, 2008.

Under Appellants' proffered construction of section 5.2(b), the Board was only bound to accept the SSA's determination as of the date of the SSA's Notice of Decision. But the date an administrative law judge issues a Notice of Decision

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section 5.2(b) says nothing about an applicant submitting, or the Board reviewing, the SSA's "file." And for good reason – the Social Security Provision would be rendered meaningless if the Board could override an SSA determination by reviewing the materials the SSA reviewed and concluding that it *disagreed* with the SSA's conclusion. Section 5.2(b) makes an SSA determination conclusive ("deemed") – not a mere suggestion that the Board may reject if it reaches a different conclusion.

bears little to no relation to when a Social Security disability applicant became disabled. The SSA has a well-known backlog. Its Inspector General reports that the *average* delay between application and a hearing – let alone a final decision – was 415 days in June 2010, and had increased to 498 days as of June 2015.[14] Because the particular date an SSA administrative law judge issues a disability finding is essentially happenstance – and in all instances is after, often years after, a person has applied for disability benefits – there is no reasonable basis for construing section 5.2(b) to allow the Board to ignore the SSA's determination of *when* an applicant became eligible for benefits. What Defendants dismiss as the SSA's "onset date" determination ***is*** the SSA's "determin[ation]" that the person is "eligible for disability benefits." The two are equivalent; they cannot be cleaved in half.

3. History of unreasoned, unprincipled decision-making. The Plan has a long and documented history of abusing its discretion and acting in bad faith. *See Jani v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 2005 U.S. Dist. LEXIS 44331, at *4 (D. Md. Nov. 7, 2005) ("Given the overwhelming evidence supporting Webster's claim, the Plan's decision indicates culpable conduct, if not bad faith"), *aff'd*, 209 F. App'x 305 (4th Cir. 2006); *Marshall*, 261 F. App'x 522

[14] Office of the Inspector General, *Improve the Responsiveness and Oversight of the Hearings Process*, available at http://oig.ssa.gov/audits-and-investigations/top-ssa-management-issues/social-security-disability-hearings-backlog (last accessed November 23, 2016).

(4th Cir. 2008) (affirming bankruptcy court's finding of NFL Plan's abuse of discretion in establishing the "onset date" of plaintiff's disability); *Giles v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 2013 WL 6909200, at *26 (D. Md. Dec. 31, 2013) (entering summary judgment against the Plan); *Stewart v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 2012 WL 2374661, at *14-15 (D. Md. June 19, 2012) (entering judgment against the Plan based on "substantial evidence" standard). This evidence further supports the District Court's conclusion that the Board's decision was not the result of a deliberate, principled reasoning process.

C. Appellants' Interpretation Was Inconsistent With Earlier Interpretations And Other Plan Provisions, And Contravened the Purposes And Goals Of The Plan.

These factors further confirm the Board's abuse of discretion, in three ways.

1. Adoption of Section 5.2(b). The circumstances surrounding the Plan's adoption of section 5.2(b) in June 2007 confirm that Appellants' proffered construction is untenable. Contemporaneous evidence of how the Plan's agents and employees understood a provision at its adoption – *i.e.*, an "earlier interpretation of the plan" – is a key factor in determining whether a plan administrator has abused its discretion. *Helton*, 709 F.3d at 354, 356.

The Plan added the Social Security "deemed disabled" provision during a time of intense public and legislative focus on the NFL Plan stemming from the Mike Webster case, which this Court decided against the same defendant parties in

Jani, 209 F. App'x at 305. A September 2007 "White Paper" concerning this change produced by the NFLPA described the Social Security provision this way: "Because of this change, . . . players already receiving Social Security benefits will not have to be examined by a Plan doctor." JA 51. That also is how NFL and NFLPA officials themselves characterized § 5.2(b) in public statements at the time. News reports quoted "officials from both parties" as saying that "any retired player who qualifies for a Social Security disability benefit will *automatically be approved* for NFL disability as well." *NFL Adopting Social Security Guidelines for Disability*, ESPN.com, June 25, 2007 (emphasis added).[15] The new provision was "a dramatic departure from the previous process, which often forced retired players to travel hundreds of miles, and at their own expense, to meet with doctors who did not treat them during their career and were unfamiliar with their cases," despite having already been determined by the Social Security Administration to be eligible for disability benefits. *Id.* NFL Commissioner Roger Goodell was quoted as hailing this change for streamlining the process for disability determinations:

> "We're looking at ways in which people who need help can get help faster," Commissioner Roger Goodell told the [Philadelphia] Daily News. "You have to have some standards. You have to have some kind of process to make sure you're being responsible. . . . *If somebody is*

[15] Available at http://sports.espn.go.com/nfl/news/story?id=2911872 (cited in Pl.'s S.J. Mem. at 26 & n.27).

> *disabled enough [to qualify] for Social Security [disability], they should be disabled under our guidelines. We've agreed to that.*"

Id. (emphasis added).

This description of section 5.2(b) – as aligning the Plan's determination of TPD status with the SSA's determination of TPD status – was also repeated during Congressional testimony by two key Plan representatives, shortly after the change was adopted. Dennis Curran, the NFL's Senior Vice-President, testified that "[w]e are trying to look at ways of speeding up the process"; "[w]e have adopted the Social Security T&P standards . . ."; and "[w]e are constantly looking to improve the manner in which we do [disability determinations], . . . by speeding up the process, as we tried to do with the Social Security benefits." JA 60, 63. Douglas Ell, Counsel to the Plan (whose firm continues to represent Appellants here), was even more explicit about SSA determinations being a substitute for Plan action:

> The collective bargaining process is an ongoing process, and the parties are looking for ways to improve benefits in the system. Our new 88 Plan for players with dementia is one example. . . . Allowing Social Security determinations ***as a separate, alternate way to get total and permanent disability benefits*** is a second improvement.

JA 62 (emphasis added). Mr. Ell did not describe SSA determinations as advisory, or as only partially effective, but as "a separate, alternate way to get total and permanent disability benefits." *Id.*

Such contemporaneous evidence of the intent of the collective bargaining parties applies directly here. The NFL and the union changed the Plan – under pressure – to minimize the burden on players whose disability was already established by an independent source. Because Social Security awards speak comprehensively about both the fact of disability and the date of its onset, they eliminate the need "to be examined by a Plan doctor." JA 51. The drafters of section 5.2(b) did not apply a scalpel to this provision when characterizing it in 2007, but rather asserted that an SSA determination will "automatically" become the Plan's determination; that the "guidelines" for disability under Social Security will govern the Plan's disability determination; and that an SSA determination will become an "alternate way to get total and permanent disability benefits." Appellants' insistence now that they can peel off what often is the most important part of part of the SSA's decision (the date of onset), while retaining the rest (the fact of disability), is flatly inconsistent with that announced purpose.

2. Earlier interpretation before this Court. In addition to the circumstances surrounding the adoption of section 5.2(b), the Plan also is already on record – with this Court, no less – as using the Social Security Administration's "date of onset" findings to determine Plan benefits. In *Marshall v. Bert Bell Plan*, the Plan sought to escape an earlier date of onset, just as it does here. But in *Marshall*, unlike here, it suited the Plan to argue that Social Security determinations should

be considered dispositive. *See Marshall*, 261 F. App'x at 526 ("At oral argument counsel for the Plan stated that . . . when the record contains social security disability records or tax returns reflecting that an applicant is unable to work, the Board has awarded benefits *retroactively to the time when employment ended*.") (emphasis added). Thus, to determine the date benefits should begin, the Plan normally relies on Social Security findings – unless, as in Mr. Solomon's case, those findings would support a higher benefit level. In that case (*i.e.*, *this* case), the Plan ignores those findings. Such arbitrary, outcome-driven legal positions are clear examples of an abuse of discretion.

3. Subsequent amendment. In 2012, the NFL and the NFLPA negotiated amendments to the Plan. Among other things, the following language was added in the Plan that became effective April 1, 2014: "determinations by the Social Security Administration as to timing . . . of total and permanent disability are not binding" on the Board. JA 213. As the District Court explained, "[s]uch a change is generally viewed as indicating a change of meaning." JA 78 (citing *DIRECTV, Inc. v. Brown*, 371 F.3d 814, 817 (11th Cir. 2004)). *See also Stone v. I.N.S.*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."). Appellants argue that the amendment "endorsed the Board's interpretation of the Plan." Br. 28. But if

section 5.2(b) was as clear as Appellants profess in this appeal, then no amendment would have been necessary.

D. The Materials Considered Were Inadequate.

This factor applies more directly to the additional reason the Board abused its discretion: its complete disregard of critical evidence presented to it. *See* § III, *infra*. But it also further confirms the Board's abuse of discretion in rejecting the SSA's onset date determination. In denying Mr. Solomon's application, the Board stated that its rejection of his earlier application, in 2009 – two years before the Social Security's decision – was "incompatible with finding that [Mr. Solomon was] totally and permanently disabled prior to March 31, 2010." JA 823. However, the 2009 denial obviously did not consider – and could not have considered – the SSA's finding in 2011 that Mr. Solomon was totally and permanently disabled since at least October 2008. Thus, the Plan's reliance on its 2009 decision was "inadequate."

E. The SSA's External Standard Showed That The Board Abused Its Discretion.

This factor asks whether the decision is consistent with "any external standard relevant to the exercise of discretion." *Booth*, 201 F.3d at 343. The SSA has already established an elaborate procedure and series of "external standards" for determining whether an individual is totally disabled, and when that disability began. *See generally* 20 C.F.R. § 404.1501, *et seq.* (definition and determination

of disability). In *Metropolitan Life Ins. Co. v. Glenn*, the Supreme Court affirmed a ruling by the Sixth Circuit that the plan administrator had abused its discretion because, even though the plan did not render Social Security determinations *binding*, the administrator "fail[ed] to reconcile its own conclusion that [the claimant] could work in other jobs with the Social Security Administration's conclusion that she could not." *Glenn*, 554 U.S. at 110. *See Glenn v. MetLife*, 461 F.3d 660, 669 (6th Cir. 2006) (the decision reviewed in *Glenn*) ("That MetLife apparently failed to consider the Social Security Administration's finding of disability in reaching its own determination of disability . . . is obviously a significant [abuse of discretion] factor.").

The Retirement Board did not even pay lip service to the SSA's long-standing procedures, let alone "reconcile" its own conclusion with the SSA's determination. Instead, the Board noted only that "such effective date decisions are not binding on the Plan." JA 823. This factor counts powerfully in favor of a finding of abuse of discretion.

F. The Board's Decision Was Infected By A Conflict Of Interest.

Finally, *Booth* requires courts to examine "the fiduciary's motives and any conflict of interest it may have." 201 F.3d at 343. A fiduciary has a conflict of interest when, for example, the same entity both pays benefits and administers the plan. *Glenn*, 554 U.S. at 112. When a fiduciary is conflicted, the conflict must be

weighed as a factor in determining whether there has been an abuse of discretion. *Id.* at 115. And once a conflict of interest has been identified, it "should prove more important (perhaps of great importance) where circumstances suggest a higher likelihood that it affected the benefits decision." *Id.* at 117.

In the District Court, the Plan argued that the Board was not conflicted because only the three NFL members represented the entity that funds the Plan.[16] (Although the District Court did not address the issue, it is a further ground for affirmance.) On appeal, the Plan make a new argument, using non-record evidence, that the Board should not be found to be conflicted because the NFL does not "fund" the Plan, which instead is funded through "charge[s] against the funds available for the salary cap." Br. 9.

1. The argument raised below**.** As explained above, three Board members represent the NFL, and three represent the NFLPA, the union for active NFL players. But even assuming that only half of the Board's members represent the entity that funds the Plan, the Board should be held to labor under a conflict of interest because, as the Second Circuit has held, where *any* member of a decision-making body represents the benefit-paying entity, the fiduciary is conflicted within

[16] *See* Defs.' Combined Opp. To Plaintiff's Mot. For Summ. J. & Reply In Further Supp. Of Defs.' Mot. For Judgment On The Admin. Rec., 14-cv-3570 (D. Md.), ECF No. 33 (Aug. 21, 2015), at 14 (citing trial court cases decided on that basis).

the meaning of *Glenn*. *Durakovic v. Building Svs. 32 BJ Pens. Fund*, 609 F.3d 133, 138-39 (2d Cir. 2010).

As *Durakovic* explains, "[a] *Glenn* analysis proceeds in two steps." *Id.* at 138. First, the court inquires "whether the 'plan administrator both evaluates claims for benefits and pays benefits claims." *Id.* Second, if so, "the court goes on to determine how heavily to weight the conflict of interest thus identified, considering such circumstances as whether procedural safeguards are in place that abate the risk." *Id.* Where non-conflicted members participate in benefit decisions, that fact may affect the "*significance* or *severity* of a conflict." *Id.* at 138. But it cannot neutralize or remove "the *existence* of a conflict." *Id.* Whenever *any* person who contributes to a benefit decision represents the entity that pays claims, that "is precisely the type of interest conflict to which *Glenn* applies." *Id.* at 139. As far as Mr. Solomon's counsel is aware, only the Ninth Circuit has reached a different conclusion – in a cursory, one-paragraph analysis. *Anderson v. Suburban Teamsters of Northern Illinois Pension Fund Bd. of Trustees*, 588 F.3d 641, 648 (9th Cir. 2009).

Of course, this Court need not resolve the Circuit split – the other factors all confirm that the Board abused its discretion. But if the Court were to conclude that the other factors weigh against an abuse of discretion, or are in equipoise, the Court should follow the Second Circuit's persuasive reasoning in *Durakovic*, and

conclude that the Board's decision was infected by a conflict of interest because half its members represent the NFL, which pays the benefits.

2. The new "salary cap" argument. On appeal, for the first time, the Plan argues that Board should not be found to be conflicted based on the three NFL members. Attaching an excerpt from the NFL Collective Bargaining Agreement ("CBA"), which was not presented below, they argue that "the costs of the Plan are deemed 'Player Benefit Costs,' and are charged against the funds available for the salary cap." Br. 9. "As such," they argue, "the Plan's costs reduce the salary cap, [and] they do not reduce NFL Club revenues." *Id.*

This argument should be rejected because it was never raised below, and is based on extra-record evidence. *Helton*, 709 F.3d at 360 ("[B]ecause AT&T failed to raise this argument before the district court, it is waived on appeal."). But even if considered, the argument suggests at most that *all six* members of the Retirement Board are conflicted, requiring that the Board be found conflicted under *Glenn*. Appellants' claim is that, because "Projected Benefits" are deducted from the "Player Cost Amount," it is effectively *active players*, and not the NFL itself, who effectively fund the benefits for retired players. If active players – *i.e.*, those represented by the NFLPA – effectively pay for disability benefits out of the dollars available for salary, this can only mean that all Board members, not just

those representing the NFL, are conflicted within the meaning of *Glenn* and *Durakovic*.

* * *

In sum, even if the Board was not bound by the plain language of section 5.2(b) to accept Social Security disability determinations, including determinations of when a person became disabled, the Board's unexplained rejection of the SSA's determination of Mr. Solomon's disability date was an abuse of discretion under the eight-factor *Booth* test.

III. Even If The SSA Onset Date Were Not Dispositive, The District Court Correctly Found That The Board Abused Its Discretion Because Of The One-Sided Evidence Of Mr. Solomon's Disability As Of March 2010.

The Board abused its discretion because it rejected the SSA's determination that Mr. Solomon was disabled from October 29, 2008 on. But even if that decision were not an abuse of discretion, the District Court's judgment should be affirmed, because the Board completely ignored critical evidence, and failed to reconcile its decision with undisputed evidence that Mr. Solomon's cognitive impairments had completely disabled him within three months of the March 2010 cut-off.

A. The Board Ignored Critical, Material Evidence.

After the Board denied his 2009 application, Mr. Solomon waited over a year to submit his December 2010 application, as discussed above. *See* pp. 12-13,

supra. The later application was new, in two critical respects. First, unlike his earlier application, which had been based solely on orthopedic impairments, his 2010 application focused on the multiple brain injuries from his football career. Second, the application presented five new reports, none of which the Board had previously considered:

(1) Dr. Fernandez's June 10, 2010 report , concluding that Mr. Solomon was "suffering from depressive . . . and behavioral symptoms, [as well as] cognitive dysfunction" as the result of, among other things, traumatic brain injury (JA 881);

(2) Dr. Stallworth's June 14, 2010 MRI report , which confirmed multifocal brain lesions "thought to be post-traumatic" in nature (JA 883);

(3) Dr. Fernandez's August 2010 report , which concluded Mr. Solomon was "disabled from numerous physical injuries and chronic pain in addition to the neuropsychiatric sequelae from which he suffers" (JA 884);

(4) Dr. DiDio's February 2011 report, which concluded that Mr. Solomon's cognitive deficits, which had worsened "over a period of 5-10 years," rendered Mr. Solomon totally and permanently disabled (JA 717-18);

(5) Dr. Fernandez's April 2011 report, which concluded, among other things, that the MRI of Mr. Solomon's brain taken in June 2010 had shown damage to his brain most likely from "external forces" (JA 767).

Despite this extensive, new evidence, the basis for the Board's denial of his 2010 application was this: "[T]he medical records you submitted with your current appeal were submitted together with your prior claim and appeal, both of which were denied." JA 823. But that was simply false. None of the five new medical reports had been "submitted" with Mr. Solomon's "prior claim."

This Court obviously cannot, and should not, *weigh* the evidence that was presented to the Board. And contrary to Appellants' suggestion, the District Court did not do this either. *Cf.* Br. 39-41. Rather, the District Court recognized the Board's complete failure to *acknowledge or explain* material evidence presented to it. Although an ERISA fiduciary has "authority to *weigh* conflicting pieces of evidence, it abuses its discretion when it fails to *address*" that conflicting evidence. *Helton*, 709 F.3d at 359 (emphasis added). *See also Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 834 (2003) ("Plan administrators, of course, may not arbitrarily refuse to credit a claimant's reliable evidence."); *Donovan v. Eaton Corp., Long Term Disability Plan*, 462 F.3d 321, 329 (4th Cir. 2006) (abuse of discretion due to plan's "wholesale disregard" of affidavit submitted by applicant); *Marshall*, 261 F. App'x at 526 & n.* (Retirement Board's decision was "arbitrary," and thus an abuse of discretion, because the Board "ignor[ed]" contrary evidence).

Below, the Board did not even attempt to argue that it was entitled to ignore this evidence. Instead, it argued that the error was harmless, because the reports were *created* after March 31, 2010, the date by which Mr. Solomon needed to be TPD to receive Football Degenerative benefits.[17] On appeal, the Board takes a

[17] *See* Mem. In Supp. Of Defs.' Mot. For J. On The Admin. Rec., 14-cv-3570 (D. Md.), ECF No. 27-1(July 31, 2015) at 25 (dismissing evidence that was not "generated" before March 31, 2010); Defs.' Combined Opp. To Plaintiff's Mot.

new approach that is no less surprising: it completely ignores the five new medical reports submitted with Mr. Solomon's 2010 application. Nowhere does Appellants' brief even acknowledge Dr. Fernandez's three detailed reports, or Dr. Stallworth MRI report – or even the report of Appellants' own, hand-picked neurologist, Dr. DiDio – all five of which provided substantial evidence that Mr. Solomon was suffering from career-ending severe cognitive and behavioral impairments due to his decade of professional football.[18]

Appellants manage to avoid addressing this substantial evidence based on the premise that the record is devoid of "persuasive, *contemporaneous* evidence" that Mr. Solomon was totally and permanently disabled before March 31, 2010. Br. 34 (emphasis added). But the Plan does not *require* that evidence be "contemporaneous." Indeed, this Court rejected this same argument, by these same defendants, in *Jani*. There, the Plan asked this Court to "disregard the testimony of the Board's own medical expert . . . because it was not

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For Summ. J. & Reply In Further Supp. Of Defs.' Mot. For Judgment On The Admin. Rec., 14-cv-3570 (D. Md.), ECF No. 33 (Aug. 21, 2015) at 5 (arguing that the August 2010 and April 2011 medical reports were irrelevant because they were "five to twelve months *after* the March 31, 2010 cut-off").

[18] Appellants suggest that the five "additional reports" were "all dated" April 2011. Br. 16. Dr. Fernandez's *third and last* report was dated April 2011, but all the other reports – including that of Dr. DiDio, the Plan's designated neurologist – were all before then: June 2010 (Fernandez #1 and Stallworth); August 2010 (Fernandez #2); and February 2011 (DiDio).

'contemporaneous.'" 209 F. App'x at 316. This Court rejected the invitation, reasoning that "[t]he law does not permit such a leap of faith." *Id.*

Moreover, the Plan cannot seriously contend that Mr. Solomon's evidence was not "conflicting" evidence that ERISA required the Board to "address." *Helton*, 709 F.3d at 359. Rather, Mr. Solomon's evidence was far closer to the type of "unanimous" evidence that the Board was not only required to *address*, but was required to *credit*. *See Jani*, 209 F. App'x at 314 ("Because a fiduciary must present substantial evidence to justify a denial of benefits, it logically follows that a fiduciary appears to abuse its discretion when, in denying benefits, it ignores unanimous relevant evidence supporting the award of benefits.") (citing, among other cases, *Stawls v. Califano*, 596 F.2d 1209 (4th Cir.1979)).

The *only* professionals who were ever asked to opine on Mr. Solomon neurological condition unanimously concluded he suffered from neurological disorders due traumatic brain injuries (Dr. Hudson, Dr. Fernandez, Dr. DiDio, and Dr. Stallworth). Likewise, the *only* professionals who were ever asked whether Mr. Solomon was totally and permanently disabled as a result of those brain injuries (Dr. Fernandez and Dr. DiDio) unanimously concluded that he was – including, as discussed below, reports issued within just a few months of the Football Degenerative cut-of date. *See* § III.B, *infra*.

In short, the Board put blinders on when considering Mr. Solomon's 2010 application, and it still – to this day – has not taken them off. *See* Br. 37 (dismissing the new evidence as "a litany of CTE-related evidence that comes ***after*** the 15-year Football Degenerative cut-off"). Reversing the District Court's judgment would necessarily condone an ERISA fiduciary's failure to consider relevant evidence presented to it, which is a quintessential abuse of discretion. *See Helton*, 709 F.3d at 359.

B. The Board Also Abused Its Discretion By Failing To Reconcile An Undisputed June 2010 Finding Of Severe Cognitive And Behavioral Impairment.

The Board abused its discretion by *ignoring* the evidence described above. But it also, independently, abused its discretion by *failing to explain* how a psychiatrist could have concluded in June 2010 – fewer than *three months* after the March 31, 2010 cutoff date – that Mr. Solomon was suffering from depression and other "behavioral symptoms" as well as "cognitive dysfunction" as the result of traumatic brain injury. JA 869, 881. Dr. Fernandez relied on a detailed neuropsychiatric examination and a battery of neuropsychological tests to reach that conclusion. Her June 2010 report linked these symptoms directly to Mr. Solomon's loss of a job in 2007 – three years before. JA 866-81.

After all, it is undisputed that the reason Mr. Solomon could not hold a job after 2007 was the neurological and cognitive effects of his brain injuries,

including, as the District Court summarized, his "chronic headaches," "'escalating' thoughts and behaviors stemming from his cognitive impairments," "'progressive numbness in Solomon's hands and feet," his "inability to 'sustain concentration'," as well as "decreased attention, poor concentration, slurred sleech, decreased recall, and increased irritability." JA 87-88. JA 884. Dr. Fernandez explicitly described Mr. Solomon as disabled, and later also noted that the problems had been worsening "over the past 5-10 years." JA 884. The NFL Plan's own neurologist, Dr. DiDio, expressly endorsed these findings. JA 718.

The Board did not mention – let alone discredit – Dr. Fernandez's conclusion in June 2010 (and again in August 2010) that Mr. Solomon was TPD due to his football-related traumatic brain injuries. But the Board also concluded that Mr. Solomon was *not* TPD as of March 31, 2010. Thus, the Board implicitly concluded that Mr. Solomon became totally and permanently disabled during the three-month period between March 31, 2010 and June 11, 2010. *Compare* JA 808 (Board: "the record did not support a finding of [TPD] prior to March 31, 2010"), *with* JA 881 (Dr. Fernandez, June 2010: "Pt. suffering from Depressive [symptoms] + behavioral [symptoms], cognitive dysfxn as the result of TBI/OSA"), *and* JA 884 (Dr. Fernandez, August 2010: "currently disabled from numerous physical injuries and chronic pain in addition to the neuropsychiatric sequalae from which he suffers").

Not only is there *no* evidence in the record to support such a finding; the Board made no effort to reconcile its conclusion with the uncontradicted evidence that Mr. Solomon lost his job in 2007 precisely because of cognitive dysfunction that worsened over the 5-10 years before August 2010. The District Court properly understood that there was no logical way to reconcile the Board's conclusion with the June 2010 Fernandez Report, and that by failing even to make the attempt, the Board abused its discretion:

> There is no evidence to support the notion that this condition manifested less than three months prior to the [June 2010] diagnosis. Moreover, in February 2011, the Plan's own neurologist noted that Solomon had suffered from worsening cognition over 5-10 years, not that his condition had suddenly deteriorated in the 11 months since March 31, 2010.

JA 88-89.

Appellants challenge that conclusion on three grounds. None holds water.

First, Appellants argue that by concluding the Board abused its discretion by failing to reconcile the June 2010 Fernandez report, the District Court "reweighed the evidence." Br. 39. But a plan administrator must consider all the evidence presented to it. *Helton*, 709 F.3d at 359. It is not "reweigh[ing]" evidence to observe, as the District Court did here, that an ERISA fiduciary completely ignored the most significant evidence.

Second, Appellants argue that "when a 'condition manifested' is irrelevant" to whether a beneficiary is entitled to Football Degenerative benefits, Br. 40, and they berate the District Court for "substituting the word 'manifest'" for 'the actual requirement of whether Solomon was totally and permanently disabled." Br. 7. But it is clear from the context of the District Court's opinion (*see, e.g.*, JA 70, 71, 75) that the question presented was whether the *disability* manifested itself (*i.e.*, "result[ed]" in total and permanent disability, JA 125 (Plan § 5.1(c))), within fifteen years of retirement, JA 70, 71, not when the *condition* first manifested, as Appellants suggest, Br. 40. And these references must also be viewed against the background of the many, varied and undisputed examples of pre-March 2010 TPD cited by the District Court. For example, when the District Court referred to "this condition manifest[ing] itself in June 2010," JA 88-89, it did so after listing eleven separate pieces of evidence of total and permanent disability ignored by the Defendants. *See* JA 87-88 (citing 2006 headaches linked to concussions; 2007 "escalating changes" in behavior leading to job loss; 2008 finding of neurological changes linked to MRI findings; 2008 Functional Capacity Evaluation finding inability to concentrate; and 2009 finding that Mr. Solomon will never "obtain or sustain meaningful employment").

Third, Appellants take issue with the District Court's characterization of Dr. Stallworth's June 14, 2010 MRI report, which diagnosed "diffuse axonal injury."

Relying on an online article the Board never cited, and that Defendants never presented to the District Court, they argue that the diffuse axonal injury observed on the MRI report did not "cause[] 'a devastating traumatic brain injury' in Solomon," but rather "can also occur in moderate and mild brain injury." Br. 40-41 (citing an article on Radiopaedia.org). The Court should disregard this argument, which Appellants never made below, based on "evidence" that is not in the record. *Helton*, 709 F.3d at 360.

But even considering it, Appellants lose. By focusing only on Dr. Stallworth's report, Appellants again insist on reviewing the evidence with blinders on. The Stallworth MRI report did find "lesions [which] are thought to represent diffuse axonal injury." JA 883. But it also described other anomalies that Dr. Stallworth "thought to be posttraumatic." *Id.* And it was not just the Stallworth report that the Board failed to reconcile, but also, for example, the June 10, 2010 Fernandez report, which found that Mr. Solomon – just three months after the cut-off – was "suffering from depressive . . . and behavioral symptoms, [as well as] cognitive dysfunction." JA 881. And it ignores Mr. Solomon's 2007 loss of employment, directly linked to his brain injuries.

For these reasons, the District Court properly held that, in addition to the other reasons described above, the Board abused its discretion by failing to point to

any evidence "to support the notion" that Mr. Solomon's cognitive-based disability had "manifested less than three months" before June 2010. JA 88-89.

CONCLUSION

The Court should affirm the District Court's grant of summary judgment to Mr. Solomon.

Dated: December 5, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify this 5th day of December, 2016, that this brief satisfies the type-volume limitations set forth in the Court's Local Rules. This brief contains 14,184 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f). This brief has been prepared in 14-point Times New Roman font that meets the typeface and type styles requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been electronically filed and service has been made by virtue of such electronic filing this 5th day of December, 2016, on the following counsel for Defendants/Appellees:

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